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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

LEVERAGE FUNDING SYSTEMS, INC.,
a corporation,
CENTAUR FILMS, a corporation,
PETER S. TRAYNOR, an individual,
WILLIAM G. McDONALD, JR.,
an individual,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a grand juror may cast a valid vote without having heard any evidence whatsoever?

2. Whether the Ninth Circuit's failure to establish any standard requiring attendance by grand jurors at grand jury sessions renders meaningless the constitutional requirement that an indictment be returned by an informed grand jury?

3. Whether the Ninth Circuit's holding that prosecutors are not required to present to the grand jury exculpatory evidence in their possession deprives the grand jury of its historic function of protecting the innocent against unfounded and malicious prosecutions?

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RICHARD H. KIRSCHNER, on behalf of LEVERAGE FUNDING SYSTEMS, INC., CENTAUR FILMS, PETER S. TRAYNOR and WILLIAM G. McDONALD, JR., petitions for a Writ of Certiorari to review the judgment of

the United States Court of Appeals for the Ninth Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 637 F.2d 645 (9th Cir. 1980). The reversed District Court opinion is found at 478 F.Supp. 799 (C.D. Ca. 1979).

## JURISDICTION

The judgment of the District Court dismissing the indictment was entered on October 17, 1979. A divided appellate court opinion reversing was filed on October 3, 1980. A petition for rehearing and suggestion for rehearing en banc was denied on February 27, 1981; the mandate was stayed until March 25, 1981.

## STATEMENT

On February 27, 1979, a 29 count indictment was filed charging violations of the mail and securities fraud statutes. On September 5, 1979, defendants filed a motion to dismiss the indictment based upon irregularities which occurred before the grand jury alleging, inter alia, that the indictment was not properly founded upon the concurrence of 12 or more grand jurors as required by Federal Rules of Criminal Procedure, Rule 6(f). The grand jury which returned the indictment in the instant case met 13 times to hear and consider evidence. Prior to the commencement of this investigation, 23 members of the grand jury were impaneled. Only 9 of the grand jurors attended each of the sessions and heard all

of the evidence presented to the grand jury. 19 jurors were in attendance on the date the indictment was returned. However, at no time during the grand jury proceedings did the prosecutor make available to jurors who were absent for particular sessions transcripts of the testimony which they missed. Nor were absentee grand jurors provided with summaries in any form of missed testimony.

On October 17, 1979, former District Court Judge Harry Pregerson issued an order dismissing the indictment because less than 12 grand jurors were informed of all of the evidence presented to the grand jury.

In an opinion rendered by a majority of the 3-judge panel [1] of the Ninth Circuit Court of Appeals, basic constitutional rights of persons who are the subjects of grand jury investigations have been gravely endangered. The majority opinion holds that a grand juror may cast a valid vote without having heard or been informed of any evidence. The opinion would permit an individual to validly be indicted by the concurrence of 12 grand jurors, 7 of whom heard no evidence whatsoever. For example, if a grand jury consists of 23 persons and meets numerous times, and 16 persons are present during each

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1/ The majority consisted of Circuit Judge Jerome Farris and Sr. District Judge William J. Jameson, sitting by designation. Circuit Judge Dorothy W. Nelson dissented from the majority opinion and adopted Judge Pregerson's decision in total.

session, but on the day of the vote, the 16 present consist of 7 members who did not attend any of the previous sessions, those 7 may nevertheless validly vote to return the indictment. The majority has held that an indictment is valid if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors; (2) every grand jury session was attended by at least 16 grand jurors; and (3) at least 12 grand jurors voted to indict. (At p. 648.) The majority has concluded that grand jurors voting an indictment need not attend every session of the grand jury, and that grand jurors may fulfill their constitutional role in determining whether the prosecution has presented a prima facie case even if they were absent during the presentation of exculpatory evidence. (At p. 648.)

Surprisingly, the majority has not required grand jurors who vote upon federal indictments to become informed of evidence presented to the grand jury during sessions at which grand jurors were absent.

A simple and practical standard for grand jury attendance would have been established if the panel had affirmed the decision of the District Court in United States v. Leverage Funding Systems, Inc., 478 F.Supp. 799 (C.D. Ca. 1979). Former District Court Judge Harry Pregerson held that, in order for an indictment to be valid it must have been returned by at least 12 grand jurors who became informed of the evidence presented during the course of an investigation by attending every grand jury session at which evidence was presented on the proposed indictment. The

indictment at bar was dismissed because it was returned by fewer than 12 grand jurors who had attended all grand jury sessions at which evidence was presented.

It should be noted that the District Court's opinion was adopted by the dissenting member of the panel which decided the appeal.

In reversing the judgment of the District Court, the majority has concluded that the prosecution has no duty to present to the grand jury exculpatory evidence within its possession, and therefore assumes that no exculpatory evidence will in fact be presented to the grand jury. (At p. 648.) The Court thus concludes that since the grand jury will receive only inculpatory evidence, a grand juror may properly vote an indictment even though he or she has not been present to hear

and consider relevant and critical evidence that may have been presented to the grand jury. The majority appears to ground its opinion upon the belief that the function of the prosecution is merely to present evidence of guilt, not withstanding the prosecutor's knowledge of evidence that negates guilt. The majority therefore concludes that a grand juror who does not consider the prosecution's entire presentation, but who is nevertheless satisfied that the Government has established probable cause that the subject of the investigation has committed a crime, may properly vote an indictment.

The decision thus overlooks the historic role of the grand jury in our judicial system to provide a shield against hasty, unwarranted, malicious

and unjustified criminal prosecutions. As the United States Supreme Court has eloquently described the Federal Grand Jury:

> "It serves the invaluable function in our society of standing between the accusor and the accused, . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal illwill."
> Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962).

In failing to establish any standard whatsoever for grand jury attendance, the majority invites the possibility that the grand jury's vital function of protecting citizens from unwarranted prosecutions may be destroyed, and that the grand jury may be reduced to acting as a rubber stamp for the Government.

Moreover, in suggesting that the prosecution has no duty to present

exculpatory evidence, the majority has further placed in serious jeopardy the power of the grand jury to protect against unfounded prosecutions. In reaching this decision, the majority has overlooked the directives of the United States Department of Justice, the policies of the American Bar Association, and well-reasoned judicial decisions, all of which require that prosecutors present to a grand jury evidence in the prosecutions's possession which negates guilt.

The majority's conclusion that grand jurors can perform their duties without having heard exculpatory evidence which was presented to the grand jury appears to be based upon the further assumption that it is not the function of the grand jury to weigh evidence. However, it is difficult to

envision how the grand jury can determine whether there exists probable cause unless it evaluates and weighs all of the evidence presented to it which either supports or negates guilt. If the grand jury's role were merely to consider some evidence of guilt, without weighing it against evidence of innocence, the grand jury's traditional function of standing between the accusor and the innocent accused would be a hollow mockery.

Due to the important effect of the majority's decision upon the administration of justice, particularly in the conduct of grand jury proceedings, it is urged that the issues presented by this petition and the majority's decision be considered by the United States Supreme Court.

## REASONS FOR GRANTING THE WRIT

By holding that grand jurors are not required to attend all sessions at which evidence of either guilt or innocence is presented to the grand jury, the majority gravely jeopardizes the constitutional guarantee that an indictment be returned by an informed grand jury. The Appellate Court's decision means that grand jurors may vote an indictment without having heard or considered any evidence of guilt. The majority's opinion thus undermines the vital role of the grand jury in shielding the innocent against unjustified prosecutions.

The majority also concludes that a prosecutor has no duty to present to the grand jury evidence in the prosecution's possession which negates guilt,

and therefore assumes that exculpatory evidence will rarely be presented to the grand jury. However, the majority's conclusion overlooked the strong trend -- led by the United States Department of Justice and the American Bar Association -- toward requiring prosecutors, in the interest of justice, to present exculpatory evidence to the grand jury. Instead, the majority has established a standard below that set by the Department of Justice for its employees and inconsistent with the official policies of the American Bar Association. The majority's standard is also lower than that set by other courts which have considered the injustice which may result when a grand jury returns an indictment without having considered evidence in the prosecution's

possession which negates the guilt of the accused.

Finally, the majority's statement that grand jurors need not hear exculpatory evidence, on the ground that it is not their function to weigh evidence, is not consistent with the grand jury's function of determining probable cause. It is only by weighing and evaluating all of the evidence of both guilt and innocence received by it that a grand jury can properly determine whether there is probable cause that the accused has committed a crime. Without having heard and considered all of the evidence presented to the grand jury, grand jurors cannot perform their constitutional function of protecting the innocent against unfounded prosecutions.

A. The Majority's Failure to Establish Any Standard Requiring Attendance By Grand Jurors at Grand Jury Sessions Renders Meaningless the Constitutional Requirement That an Indictment be Returned by an Informed Grand Jury.

If the Fifth Amendment guarantee of indictment by an informed grand jury is to be meaningful, the grand jurors who return an indictment must be informed of all of the evidence presented on the proposed indictment and must consider and evaludate that evidence. Otherwise, the grand jury cannot perform its function of determining whether an accusation is founded upon reason and supported by probable cause. See United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). Recognizing that problem, Judge Pregerson cogently stated in his opinion that "[j]urors who are ignorant of some of

the evidence presented to the grand jury cannot effectively question the validity of the prosecution's case." United States v. Leverage Funding, supra, 478 F.Supp. at 801.

Judge Pregerson's thoughtful opinion clearly demonstrates the necessity of standards for grand jury attendance. Judge Pregerson reasoned that, in order to maintain the fairness and independence of the grand jury, courts must ensure that grand jurors who vote an indictment be informed by having heard all exculpatory evidence and all noncumulative evidence presented to the grand jury on the proposed indictment. 478 F.Supp. at 802. However, if the only means of challenging the validity of a grand juror's vote were a demonstration that he or she had missed exculpatory or noncumulative inculpatory

evidence, courts would become involved in lengthy and burdensome analyses of evidence, a veritable morass. 478 F. Supp. at 803. In order to avoid the necessity for such analyses, Judge Pregerson adopted a "bright line rule" which simply requires that a grand juror who votes an indictment attend all grand jury sessions and hear all of the evidence presented to the grand jury on the proposed indictment, whether that evidence is inculpatory or exculpatory. 478 F.Supp. at 803.

As a result of the majority's reversal of Judge Pregerson's decision and its concurrent failure to establish attendance standards for grand jurors, a grand juror may vote upon an indictment without having heard <u>any</u> evidence presented in support of the charges, so long as each grand jury session was

attended by 16 grand jurors. As has been demonstrated, the majority's decision means that 7 of the 12 grand jurors who concur in an indictment can cast their votes without having heard any evidence in support of the charges.[2/]

Courts exercise their supervisory power over grand juries in order to prevent such gross abuses of the grand jury system. United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977). Judge Pregerson's simple requirement that a grand juror who votes an indictment

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2/ Nothing in the Court's holding would prevent such drastic consequences. While the majority has stated that "courts must presume that grand jurors have properly performed their duties," at p. 648, such a presumption is meaningless where there is no standard of attendance by which grand jurors' performance of their duties can be measured.

must attend every grand jury session is a reasonable means of determining whether an indictment was returned by an informed grand jury. A less restrictive standard has been suggested in this Circuit, whereby absentee grand jurors would be permitted to vote if transcripts of the evidence received by the grand jury when they were absent are read aloud to them. United States v. Roberts, 481 F.Supp. 1385, 1388 (C.D. Ca. 1980).[3/] That was not done in the case at bar. The majority's decision establishes no standard whatsoever by which it may be determined whether an indictment was returned by an informed grand jury.

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3/ The practice of reading aloud transcripts of prior testimony has been approved by the Ninth Circuit. United States v. Chanen, supra, 549 F.2d at 1311.

A comparison of petit juries and grand juries is instructive. It is well-established that a petit juror who has been absent when testimony is presented during a trial is disqualified from participating in the jury's deliberations. See United States v. Virginia Erection Corp., 335 F.2d 868, 870 (4th Cir. 1964). A petit juror who has not heard all of the evidence obviously cannot weigh that evidence to determine guilt or innocence.

Although a grand jury does not make a final adjudication of guilt or innocence, United States v. Calandra, supra, 414 U.S. at 343, 94 S.Ct. at 618, the grand jury's constitutionally mandated function of determining probable cause also entails important fact-finding obligations. The difference in the standard of proof before grand and petit

juries does not diminish the importance of grand jurors' attendance.

Moreover, there is no good reason why grand jurors should not be required to attend every grand jury session. Trial courts compel the perfect attendance of petit juries as a matter of course. In a lengthy trial, a petit juror's perfect attendance may well be a far more burdensome duty than would be the perfect attendance of a grand jury during the course of an investigation. Courts, in the exercise of their supervisory power over grand juries, clearly have the power to compel the attendance of grand jurors and should exercise that power.

In reaching its decision in the case at bar, the majority relied heavily upon the 36-year-old case of United States ex rel. McCann v. Thompson, 144 F.2d 604

(2d Cir.), cert. denied, 323 U.S. 790 (1944). That reliance is misplaced for several reasons.

First, McCann antedates many of the important constitutional developments of the past 30 years by which the rights of criminal suspects have won increased protection. In particular, McCann was decided nearly 20 years before the United States Supreme Court held in Wood v. Georgia, supra, that a grand jury must be informed in order to fulfill its function of protecting the innocent against unwarranted prosecutions. In fact, nowhere in McCann is there a discussion of that important protective function of grand juries.

Second, a major basis of the Second Circuit's decision in McCann was "the extreme difficulty of ever proving what was the evidence before a grand

jury." 144 F.2d at 607. That difficulty has been obviated by the 1979 amendment of Rule 6(e)(1), Federal Rules of Criminal Procedure, pursuant to which all grand jury proceedings are recorded, except when the grand jury is deliberating or voting. The historical notes by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, concerning the purpose of Rule 6(e)(1), demonstrate that the benefits to be derived from recordation include the preservation of testimony and the restraint of prosecutorial abuse before the grand jury.[4/] It is obvious that

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4/ One type of prosecutorial abuse which may be restrained by the recordation requirement of Rule 6(e)(1) is the failure of the prosecution to present to the grand jury evidence negating the guilt of the accused. The obligation of a federal prosecutor to present such evidence is discussed, infra.

the recordation requirement also enables courts to determine with precision the evidence which was presented when grand jurors failed to attend particular grand jury sessions.

Third, the McCann opinion is contrary to the majority's holding that grand jurors need not be present when exculpatory evidence is presented to the grand jury. The Second Circuit acknowledged:

> "the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur; but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character. . ." 144 F.2d at 607. (Emphasis added.)

The above-quoted language suggests that the Second Circuit allows the

accused the opportunity to demonstrate that exculpatory evidence was presented to the grand jury at a time when not all of the grand jurors who voted for the indictment were present.[5/] The majority's decision goes far beyond McCann in holding that a grand juror may vote to indict without having heard any exculpatory evidence that was presented.

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5/ It is important to note that the Second Circuit now requires prosecutors, in the interest of justice, to present to the grand jury any substantial evidence negating guilt, at least where that evidence might reasonably be expected to lead the grand jury not to indict. United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979).

B. The Majority's Holding That Prosecutors Are Not Required to Present to the Grand Jury Exculpatory Evidence in Their Possession Deprives the Grand Jury of its Historic Function of Protecting the Innocent Against Unfounded and Malicious Prosecutions.

By holding that prosecutors are not required to present exculpatory evidence to the grand jury, and that grand jurors need not be present to hear and consider such evidence even when it is presented, the majority deprives the grand jury of its traditional function of protecting the innocent. Exculpatory evidence is crucial to the determination of probable cause, because evidence which negates an element of the crime charged may cause the grand jury to determine that probable cause is lacking. Thus, in order to perform its function of determining probable cause,

the grand jury must consider all evidence which is relevant to that determination.6/

In reaching its decision, the majority has overlooked the fact that federal prosecutors are required, by the regulations of their agency, to present exculpatory evidence to the grand jury. Section 9-11.334 of the

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6/ The Ninth Circuit has held, in United States v. Y. Hata & Co., 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828 (1976), that evidence in the prosecution's possession which tends to negate the guilt of the accused need not be presented to the grand jury. The opinion lacks both citations of authority and a full discussion of the Court's reasons for establishing a rule which so greatly limits the grand jury's ability to reach a fair decision. The holding in Hata, of course, does not bind this Court. In light of the importance of preserving the fairness of the grand jury system, the issue of presenting exculpatory evidence to the grand jury surely deserves fresh consideration by this Court.

United States Attorneys Manual, promulgated by the United States Department of Justice, provides, in pertinent part, as follows:

> "[W]hen a prosecutor conducting a grand jury is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such person." (Emphasis added.)

In addition, prosecutors are bound by ethical obligations to present to the grand jury evidence which negates guilt. Section 3-3.6 of the American Bar Association Standards for Criminal Justice Relating to the Prosecution Function (2d Ed. 1980) provides:

> "No prosecutor should knowingly fail to disclose to the grand jury any evidence which will tend substantially to negate guilt."

Section 3-3.6 has received judicial approval. United States v. Ciambrone, supra, 601 F.2d at 623; United States v. Gold, 470 F.Supp. 1336, 1353 (N.D. Ill. 1979).

Several courts have recently held that exculpatory evidence must be presented to the grand jury in order to preserve the proper functioning and fairness of grand jury proceedings.[7] United States v. Roberts, supra, 481 F. Supp. at 1390; United States v. Ciambrone, supra, 601 F.2d at 623; United States v. Gold, supra, 470 F.Supp. at

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7/ Because of the ex parte nature of grand jury proceedings, in which the subject of the investigation lacks the assistance of counsel to ensure the fairness of those proceedings, it is as critical as it is at a trial that the fact finders be informed of evidence tending to demonstrate innocence. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

1353; United States v. Olin Corp., 465 F.Supp. 1120, 1127 (W.D. N.Y. 1979); United States v. Phillips Petroleum Co., 435 F.Supp. 610, 618 (N.D. Okla. 1977); United States v. Braniff Airways, Inc., 425 F.Supp. 579 (W.D. Tex. 1977); United States v. Mandel, 415 F.Supp. 1033, 1042 (D. Md. 1976); see United States v. DeMarco, 401 F.Supp. 505, 513 (C.D. Ca. 1975), aff'd on other grounds, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977).

## CONCLUSION

Thus, the trend has been to increase the assurances that grand jury proceedings are conducted with fairness and objectivity. It is respectfully submitted this Court should establish grand jury attendance requirements

and establish standards of conduct for federal prosecutors before grand juries which are at least as stringent as the standards established by the Department of Justice for its employees.

Respectfully submitted,

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